Page

VIII. THE ACT AS AMENDED VIOLATES SECTION 5, OF ARTICLE X, OF THE MONTANA CONSTITUTION, WHICH PROVIDES THAT COUNTIES SHALL PROVIDE SUCH RELIEF AS IS CONTEMPLATED BY THE ACT, AND SUCH PROVISIONS OF THE CONSTITUTION ARE MANDATORY AND PROHIBITORY 64

IX. THE ACT AS AMENDED DELEGATES LEGISLATIVE POWER TO THE GOVERNOR, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE MONTANA CONSTITUTION, IN THAT HE IS AUTHORIZED TO DETERMINE THE AMOUNT OF THE TAX TO BE CREDITED TO THE EMERGENCY RELIEF FUND AND DECLARE BY PROCLAMATION WHEN SAID MONEY SHALL NO LONGER BE REQUIRED FOR SAID PURPOSE 68

CONCLUSION 68

APPENDIX 70

Page

TABLE OF CASES

A

Ark Ash Lumber Co. v. Pride and Fairley,
162 Ark. 235; 258 S. W. 335 ..... 13, 61
Armour & Co. v. Virginia, 246 U. S. 1 ..... 10, 42

B

Barrett as President of the Adams Express Co. v. City of New York, 232 U. S. 14 ..... 8, 18, 19, 36
Board of Commissioners of Red River Bridge District v. Wood, 183 Ark. 1082; 40 S. W. (2d) 435 ..... 13, 64
Bowman v. Continental Oil Co.,
256 U. S. 642 ..... 8, 9, 18, 19, 24, 26, 29, 31, 34, 36

C

Citizens Tel. Co. v. Fuller, 229 U. S. 322 ..... 11, 42
City of Butte v. Montana Independent Tel. Co.,
50 Mont. 574; 148 Pac. 384 ..... 9, 12, 53
City of Oakland v. Great Western Power Co.,
186 Cal. 570; 200 Pac. 395 ..... 12, 56
Consolidated Gas Co. of New York v. Newton,
267 Fed. 231 ..... 11, 46
Cotting v. Godard, 183 [illegible]. S. 79 ..... 10, 39

Page

E

East Ohio Gas Co. v. Tax Commission,
283 U. S. 465 ..... 9, 24, 26, 27
Ex Parte Young, 209 U. S. 123 ..... 11, 43, 44, 45
Express Co. v. Seibert, 142 U. S. 339 ..... 10, 33

G

Galveston Electric Co. v. Galveston, 258 U. S. 387 .... 11, 46
Guthrie Daily Leader v. Cameron,
3 Okla. 377; 41 Pac. 635 64

H

Hale v. Treasurer of Mineral County,
82 Mont. 98; 265 Pac. 6 ..... 10, 42
Helson v. Kentucky, 279 U. S. 245 22
Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102; 29 Pac. 883 ..... 9, 12, 50

I

In re Johnson, 137 Cal. 110; 69 Pac. 971 ..... 12, 55
In re Pomeroy, 51 Mont. 119; 151 Pac. 333 ..... 13, 60
In re Weston, 28 Mont. 207; 72 Pac. 512 ..... 12, 14, 52

J

Jones v. Cooney, 81 Mont. 340; 263 Pac. 429 ..... 14, 66
Johnson v. City of Great Falls, et al.,
38 Mont. 369; 99 Pac. 1059 ..... 12, 53
Journal Publishing Co. v. Kenney,
9 Mont. 389; 24 Pac. 96 ..... 13, 61

Page

K

Keher v. Stewart, 197 U. S. 60.....10, 33

L

Leloup v. Port of Mobile, 127 U. S. 640.....12, 57
Louis K. Liggett Co. v. Lee, 288 U. S. 517.....10, 38
Louisville Gas & E. Co. v. Coleman, 277 U. S. 32.....10, 40

M

Missouri Pacific Railway Co. v. Tucker,
230 U. S. 340.....11, 45

N

New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, 280 U. S. 338.....8, 9, 18, 20, 32, 34, 36
Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County, 28 Mont. 484; 72 Pac. 982..... 49

O

Osborne v. Florida, 164 U. S. 650.....9, 33

P

Peabody v. Russell, 302 Ill. 111; 134 N. E. 150.....13, 60
Pedro v. Grootemaat, 174 Wis. 412; 183 N. W. 153....13, 64
Philadelphia & Reading R. R. Co. v. Pennsylvania,
15 Wall. 232.....12, 57
Pickard v. Pullman Southern Car Co.,
117 U. S. 34.....8, 12, 17, 18, 36, 57

Page

Postal Telegraph-Cable Co. v. Charleston,
153 U. S. 692 ..... 10, 33
Postal Telegraph-Cable Co. v. City of Fremont,
255 U. S. 124 ..... 10, 33
Postal Telegraph-Cable Co. v. City of Richmond,
249 U. S. 252 ..... 10, 33

R

Rail, etc., Coal Co. v. Yaple, 236 U. S. 338 45
Railroad Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414 ..... 10, 38
Raley & Bros. v. Richardson, 264 U. S. 157 ..... 10, 33
Rast v. Van Deman and Lewis, 240 U. S. 342 44
Russell v. Sebastian, 233 U. S. 195 ..... 12, 51, 56

S

Sprout v. South Bend, 277 U. S. 163 ..... 9, 24, 26, 27
State ex rel. Crumb v. City of Helena,
34 Mont. 67; 85 Pac. 744 ..... 9, 12, 53, 58
State ex rel. Redman v. Meyers, 65 Mont. 124;
210 Pac. 1064 62
State ex rel. Wyatt v. Ashbrook, 154 Mo. 375;
55 S. W. 627; 48 L. R. A. 265 ..... 13, 63, 64
State Tax Commissioners v. Jackson, 283 U. S. 527 ... 10, 39
State v. Baltimore & Ohio R. Co., 113 Md. 179;
77 Atl. 433 ..... 13, 64
State v. Crawford, 74 Wash. 248; 133 Pac. 390 ..... 11, 45
State v. Gowdy, 62 Mont. 119; 203 Pac. 115 ..... 14, 66, 67

Page

State v. Helena W. W. Co., et al., 43 Mont. 169; 115 Pac. 200.....12, 52
State v. Hays, 86 Mont. 58; 282 Pac. 32.....13, 62
State v. Miksicek, 225 Mo. 561; 125 S. W. 507.....13, 62
State v. Northern Pacific Express Co., 27 Mont. 419; 71 Pac. 404..... 9, 30
State v. Oregon, etc., Co., 68 Wash. 160; 123 Pac. 3... 45
State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394; 71 Pac. 311..... 29
State v. State Board of Examiners, 74 Mont. 1; 238 Pac. 316.....12, 59

T

Town of Suisun City v. Pacific Gas & Elec. Co., 35 Cal. App. 380; 170 Pac. 1078.....12, 55

V

Veto Case, 69 Mont. 325; 222 Pac. 428.....14, 68

W

Walker v. Bedford, 93 Colo. 400; 26 Pac. (2d) 1051 .....14, 66, 67
Western Union Telegraph Co. v. Kansas, 216 U. S. 1.. 9, 32
Williams v. Standard Oil Co., 278 U. S. 235..... 47

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND TEXT BOOKS

Civil Code of Montana of 1895,
Section 1000 ..... 50, 51, 53
Section 1001 ..... 50, 51
Constitution of the United States,
Article I, Section 10 57
Article X, Section 1 51
Constitution of Montana,
Article III, Section 29 ..... 52, 59, 64
Article IV, Section 1 ..... 14, 68
Article V, Section 26 ..... 13, 61
Article X, Section 5 ..... 14, 64, 66
Article XII, Section 7 49
Article XII, Section 10 ..... 12, 13, 58, 60
Article XV, Section 14 ..... 9, 11, 48, 49, 50
52, 53, 56, 57, 58
4 *Corpus Juris*, Pages 1457, 1458, 1460 ..... 14, 68
Laws of the Extraordinary Session of Montana, 1933-34,
Chapter 20 65
Chapter 56 65
Pond on Public Utilities, 3rd Edition,
Section 698 10
Section 699 10
Revised Codes of Montana, 1921,
Sections 2296 to 2304 49
Section 6645 ..... 48, 51
Section 6646 ..... 48, 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 423

FRANK H. COONEY, as Governor of the State of Montana;

RAYMOND T. NAGLE, as Attorney General of the State of Montana; and

JAMES J. BRETT, as Treasurer of the State of Montana,

Appellants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellee.

Brief of Appellee

STATEMENT OF THE CASE

The case is before this court on appeal from the District Court of the United States for the State of Montana. That court, specially constituted, as required in such cases by Section 266 of the Judicial Code, heard the case on ap-

plication for temporary injunction, and by stipulation of the parties it was submitted for final decision and decree, and a permanent injunction was granted. By the judgment the appellants here were enjoined from enforcing, or attempting to enforce, two acts of the Legislature of the State of Montana, copies of which are set out in full as an appendix to this brief.

The original act, Chapter 174 of the Session Laws of Montana, 1933, as indicated by the title, requires all persons and corporations "*engaged in or carrying on the business of constructing, maintaining and operating telephone lines and telephone instruments* within the State of Montana to pay *license taxes.*" Section 1 of the act provides that all such persons and corporations "*engaged in the business of operating or maintaining telephone lines and furnishing telephone service* in the State of Montana," shall pay to the State Treasurer on or before the first day of January each year *a license tax* in the amounts following "for each *telephone instrument* used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all, or any part of the calendar year, to-wit: *On the* first twenty (20) *telephone instruments* or less a *license tax* of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) *such instruments* a *license tax* of Twenty Cents (20c) *per phone*, and on all above seventy-five (75) a *license tax* of One Dollar ($1.00) for *each such instrument.*"

It is then provided: "The *license tax* so paid shall in no manner affect the rates charged to the patrons and users of such *telephone instruments*, but shall be borne entirely by the owning and operating concern."

Then follows a proviso that the tax provided for "shall

not be *imposed on any telephone instrument*" where the rate charged the customer does not exceed $2.00 per month for residence telephones, and $3.00 per month for business telephones.

This act provided that a violation thereof should be a misdemeanor, and punished by a fine of not more than $1,000.00, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. It is then provided that all such license fees paid to the State Treasurer shall be divided by him as between the counties of the state, according to the number of telephone instruments in use from time to time in the several counties.

Effective January 20, 1934, this act was amended so as to require such persons and corporations "*engaged in the business of operating or maintaining telephone lines and furnishing telephone service* in the State of Montana" to pay to the State Treasurer on or before the first day of March of each year "*a license tax* in the amounts following *for each telephone instrument used, controlled and operated by it* in the conduct of such business: A *license tax* of Two Dollars ($2.00) for *each such instrument.*" It is then provided that no bill, statement or account rendered or given to any customer shall set out or contain, as a separate item, any amount on account of or by reason of the license tax imposed. It is then provided that all such persons and corporations affected by the act shall be permitted to claim as *exempt* from the tax "*any telephone instrument*" where the rate charged the customer does not exceed $2.00 per month for residence telephones, and $4.00 per month for business telephones. It is then provided that the act shall not apply to mutual telephone companies, or lines not organized, used or operated for gain. It is then provided that five per cent of such license fees so paid to the State

Treasurer is appropriated for the purpose of defraying the cost of administering the act, and 95 per cent thereof is required to be credited to the Emergency Relief Fund until such time as the Governor shall issue a proclamation to the effect that the same is no longer required for such fund, after which the 95 per cent is required to be credited to the General Fund of the State. It is then provided that any tax which had accrued, or become payable, under the original act, should not be released or waived by the passage of the amendment, but that the same should be paid as required by the original act. (Italics in both statutes ours.)

Accordingly, two license taxes were required to be paid in the year 1934—one on January 1st under the original act, and the other on March 1st under the act as amended.

The case made by the bill of complaint and answer, and by the undisputed evidence, may be briefly stated as follows: The appellee is a subsidiary of the American Telephone and Telegraph Company, and is engaged in rendering telephone service throughout the States of Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and part of Texas, providing local exchange telephone service, and intrastate and interstate long distance toll service; also, through connecting agreements with the American Telephone and Telegraph Company, and other telephone companies, it affords instrumentalities and facilities for direct telephone communication between its subscribers and the public of Montana, and its subscribers and the public of the other states in which it operates, and telephone subscribers and the public throughout the United States and foreign countries. There are approximately 16,600,000 telephones in the United States, and over 30,000,000 in the entire world, and it is possible for the subscribers of the appellee and the public in the State of Montana to

communicate with persons using practically all of these telephones (R. 25, 35).

The appellee has in service over 34,000 telephone instruments in the State of Montana, for which a rate is charged of more than $2.00 per month for residence telephones, and more than $3.00 per month for business telephones; and approximately 29,000 telephone instruments in use in Montana, for which a rate is charged of more than $2.00 per month for residence telephones, and more than $4.00 per month for business telephones (R. 33). This separation was made because of the variation between the original act and the amendment, as to the charge for the business telephones. Between March 16, 1933 and January 1, 1934, the appellee was able to determine that more than 10,000 of these telephone instruments in Montana were actually used for interstate communication, and between January 1, 1934 and March 20, 1934, 2108 additional telephones were used in interstate communication (R. 34). The check on this matter had to be limited to the period of time after the original act became effective, and this check did not include all interstate calls originating in states other than Montana and foreign countries, and terminating in Montana (R. 34). In addition to this, it was shown that arrangements are made with the Western Union and Postal Telegraph Companies, whereby any person can originate at any telephone in the State of Montana, belonging to the appellee, and affected by the acts under consideration, a telegram, cablegram, or radiogram, to any point served by these telegraph companies. Likewise, telegrams originating with the telegraph companies anywhere may be delivered to subscribers of the appellee in Montana over their telephones. These telegraph companies operate throughout the United States, and are engaged in sending

interstate messages, as well as intrastate messages (R. 35).

There are sixty-four telephone companies engaged in business in Montana. Fifty of these companies charge rates not to exceed $2.00 for residence telephones, and $4.00 for business telephones. Only fourteen of these companies are in any way affected by the acts under consideration (R. 36).

It would not be possible to operate separately the interstate and the intrastate business of the company. The same telephone instruments, the same signalling apparatus, and the same poles, wires and cables are used in common for both classes of service. It would require 100 per cent duplication of outside distributing plant and telephones, and a large duplication of central office equipment. The attendant expense of such disconnected operation would substantially destroy all telephone service as it is known today, and prices would be prohibitive (R. 39).

In addition to the 12,108 telephones known to have been used since March 16, 1933 in making interstate calls, approximately 800 additional telephones would be so used each month. Accordingly, it is only a question of time until practically every telephone instrument in the State of Montana will have been used in interstate commerce (R. 39). As 100 per cent is approached, of course the curve ("Plaintiff's Ex. 2" R. 40 A) flattens out, because there will be some instruments not used in interstate commerce, but eventually practically all will be so used (R. 40).

In addition to calls originating in the State of Montana, there are many interstate calls terminating in Montana; that is, the appellee's subscribers in Montana will be called from points outside of the state, and in such cases, the matter is not controlled by the will of the subscribers in Montana, but is entirely dependent upon the will of telephone

subscribers and the public who may desire to make interstate calls to points in Montana (R. 41). Thus each and all of the telephone instruments affected by these acts are instrumentalities of interstate commerce, entirely without regard to the will of the subscribers in Montana.

The first interstate line in Montana was opened for public use September 3, 1899. At the present time, the appellee has eighty-four interstate lines (R. 37). This is shown on the map marked "Plaintiff's Exhibit 1," and attached to page 38 of the record.

The testimony produced by appellee was wholly uncontradicted, and the District Court made definite and specific findings of fact, as required by Equity Rule 70½ (R. 24). We summarize the findings of fact: Paragraph 5 of the Findings sets forth the operations of the appellee, in line with the testimony to which we have already referred, and ends with this language:

> "That of these telephones in Montana over 34,000 are affected by this statute, and of these 34,000, more than 10,000 have actually been used in interstate and foreign commerce since the statute in question was enacted, and in due time it is reasonably likely that all telephone instruments maintained and operated by the plaintiff in the state, as a part of this system, will be so used in interstate and foreign commerce." (R. 25)

In Paragraph 6, the court found:

> "*That the plaintiff pays the usual property taxes in Montana and also pays the corporation license, or occupation taxes, which are a percentage of its intrastate revenues.*" (R. 25)

In Paragraph 9, the court found:

> "That *all of said telephones* constituting a part of said system in Montana *are instrumentalities of interstate and foreign commerce*, and plaintiff could not

discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business." (R. 25-26). (Italics ours).

The appellants assign error in this court upon the findings of fact to which we have just referred, on the basis that there is no sufficient evidence to support such findings.

The opinion of the court is reported in 7 *Fed. Sup.* 12.

SUMMARY OF ARGUMENT

I.

THE ACTS INTERFERE WITH AND IMPOSE A BURDEN UPON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

(a) *This court has uniformly held that a state may not impose any license or excise tax upon the privilege of engaging in interstate commerce, or upon any of the instrumentalities used in interstate commerce, or for the privilege of using instrumentalities in such commerce.*

Pickard v. Pullman Southern Car Co.,
117 U. S. 34.
Barrett as President of the Adams Express Co. v. City of New York,
232 U. S. 14.
Bowman v. Continental Oil Co.,
256 U. S. 642.
New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment,
280 U. S. 338.

(b) *As the telephone business has been developed with the common use of the telephone instruments, poles, wires, switchboards, and other instrumentalities in both*

intrastate and interstate commerce, the appellee could not discontinue the intrastate business in Montana without withdrawing also from the interstate business. For this reason, the acts are invalid, and violate the Commerce Clause of the Constitution of the United States.

Sprout v. South Bend,
277 U. S. 163.
East Ohio Gas Co. v. Tax Commission,
283 U. S. 465.
Constitution of Montana, Article XV, Sec. 14.
Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102, 116; 29 Pac. 883.
State ex rel. Rocky Mountain Bell Tel. Co. v. Mayor of Red Lodge,
30 Mont. 338, 340; 76 Pac. 758.
State ex rel. Crumb v. City of Helena,
34 Mont. 67, 71; 85 Pac. 744.
City of Butte v. Montana Independent Tel. Co.,
50 Mont. 574, 577; 148 Pac. 384.

(c) *The acts make no attempt to discriminate as between intrastate commerce and interstate commerce, and, indeed, it would be impossible to do so. The disavowal of the Attorney General of Montana of any intent to burden interstate commerce does not aid his case.*

State v. Northern Pacific Express Co.,
27 Mont. 419; 71 Pac. 404.
Bowman v. Continental Oil Co.,
256 U. S. 642.
New Jersey Bell. Tel. Co. v. State Board of Taxes and Assessment,
280 U. S. 338.
Western Union Telegraph Co. v. Kansas,
216 U. S. 1.

Cases cited and distinguished:

Osborne v. Florida,
164 U. S. 650.

Postal Telegraph-Cable Co. v. Charleston,
153 U. S. 692.
Postal Telegraph-Cable Co. v. City of Fremont,
255 U. S. 124.
Postal Telegraph-Cable Co. v. City of Richmond,
249 U. S. 252.
Keher v. Stewart,
197 U. S. 60.
Raley & Bros. v. Richardson,
264 U. S. 157.
Express Co. v. Seibert,
142 U. S. 339.

(d) *Some observations with respect to appellants' brief on the interstate commerce feature of the case.*

II.

THE ACTS DENY TO THE COMPANY THE EQUAL PROTECTION OF THE LAWS, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a) *Because of the exceptions therefrom of telephone instruments as therein stated.*

Railroad Commission v. Cumberland Tel. & Tel. Co.
212 U. S. 414.
Pond on Public Utilities, 3rd Edition,
Sections 698 and 699.
Louis K. Liggett Co. v. Lee,
288 U. S. 517.
State Tax Commissioners v. Jackson,
283 U. S. 527.
Cotting v. Godard,
183 U. S. 79.
Louisville Gas & E. Co. v. Coleman,
277 U. S. 32.
Hale v. Treasurer of Mineral County,
82 Mont. 98; 265 Pac. 6.

Armour & Co. v. Virginia,
246 U. S. 1.
Citizens Tel. Co. v. Fuller,
229 U. S. 322.

(b) *The penalties imposed by the acts are so severe and excessive as to deny to the company the equal protection of the laws.*

Ex Parte Young,
209 U. S. 123.
Missouri Pacific Railway Co. v. Tucker,
230 U. S. 340.
State v. Crawford,
74 Wash. 248; 133 Pac. 390.

III.

THE ORIGINAL ACT CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT PROVIDED THAT THE LICENSE TAX SHOULD IN NO MANNER AFFECT THE RATES CHARGED THE PATRONS OF THE COMPANY, BUT SHOULD BE BORNE ENTIRELY BY THE COMPANY.

Galveston Electric Co. v. Galveston,
258 U. S. 387.
Consolidated Gas Co. of New York v. Newton,
267 Fed. 231.

IV.

THE ACTS IMPAIR THE OBLIGATION OF THE CONTRACT WITH APPELLEE, RESULTING FROM THE CONSTRUCTION OF A TELEPHONE SYS-

TEM IN MONTANA, PURSUANT TO THE RIGHT GRANTED BY SECTION 14, OF ARTICLE XV, OF THE MONTANA CONSTITUTION.

Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102; 29 Pac. 883.
Russell v. Sebastian,
233 U. S. 195.
In re Weston,
28 Mont. 207; 72 Pac. 512.
State v. Helena W. W. Co., et al.,
43 Mont. 169; 115 Pac. 200.
Johnson v. City of Great Falls, et al.,
38 Mont. 369; 99 Pac. 1059.
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Butte v. Montana Independent Telephone Co.,
50 Mont. 574; 148 Pac. 384.
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Town of Suisun City v. Pacific Gas & Elec. Co.,
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City of Oakland v. Great Western Power Co.,
186 Calif. 570; 200 Pac. 395.
Philadelphia & Reading R. R. Co. v. Pennsylvania,
15 Wall. 232.
Pickard v. Pullman Co.,
117 U. S. 34.
Leloup v. Port of Mobile,
127 U. S. 640.

V.

THE ACTS VIOLATE SECTION 10, OF ARTICLE XII, OF THE MONTANA CONSTITUTION, IN THAT THEY DIRECT THE TREASURER OF THE STATE OF MONTANA TO PAY MONEYS OUT OF THE TREASURY OF THE STATE WITHOUT SPECIFIC APPROPRIATIONS HAVING BEEN MADE THEREFOR BY LAW.

State v. State Board of Examiners,
74 Mont. 1; 238 Pac. 316.

VI.

THE ACT AS AMENDED VIOLATES THE MONTANA CONSTITUTION, BECAUSE THE AMOUNT THEREBY APPROPRIATED AND TO BE CREDITED TO THE EMERGENCY RELIEF FUND IS NOT SPECIFIED, AS REQUIRED BY SECTION 10, OF ARTICLE XII.

In re Pomeroy,
51 Mont. 119; 151 Pac. 333.
Peabody v. Russell,
302 Ill. 111; 134 N. E. 150.
Journal Publishing Co. v. Kenney,
9 Mont. 389; 24 Pac. 96.

VII.

THE ACTS ARE SPECIAL LAWS FOR THE ASSESSMENT OR COLLECTION OF TAXES, IN VIOLATION OF ARTICLE V, SECTION 26, OF THE MONTANA CONSTITUTION.

Ark-Ash Lumber Co. v. Pride and Fairley,
162 Ark. 235; 258 S. W. 335.
State v. Hays,
86 Mont. 58; 282 Pac. 32.
State v. Miksicek,
225 Mo. 561; 125 S. W. 507.
State ex rel. Wyatt v. Ashbrook,
154 Mo. 375; 55 S. W. 627; 48 L.R.A. 265.
Pedro v. Grootemaat,
174 Wis. 412; 183 N. W. 153.
State v. Baltimore & Ohio R. Co.,
113 Md. 179; 77 Atl. 433.

Board of Commissioners of Red River Bridge District v. Wood,
183 Ark. 1082; 40 S. W. (2d) 435.

VIII.

THE ACT AS AMENDED VIOLATES SECTION 5, OF ARTICLE X, OF THE MONTANA CONSTITUTION, WHICH PROVIDES THAT COUNTIES SHALL PROVIDE SUCH RELIEF AS IS CONTEMPLATED BY THE ACT, AND SUCH PROVISIONS OF THE CONSTITUTION ARE MANDATORY AND PROHIBITORY.

State v. Gowdy,
62 Mont. 119; 203 Pac. 1115.
Jones v. Cooney,
263 Pac. 429; 81 Mont. 340.
Walker v. Bedford,
93 Colo. 400; 26 Pac. (2d) 1051.
In re Weston,
28 Mont. 207; 72 Pac. 512.

IX.

THE ACT AS AMENDED DELEGATES LEGISLATIVE POWER TO THE GOVERNOR, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE MONTANA CONSTITUTION, IN THAT HE IS AUTHORIZED TO DETERMINE THE AMOUNT OF THE TAX TO BE CREDITED TO THE EMERGENCY RELIEF FUND AND DECLARE BY PROCLAMATION WHEN SAID MONEY SHALL NO LONGER BE REQUIRED FOR SAID PURPOSE.

4 Corpus Juris, and cases cited,
Pages 1457, 1458 and 1460.
Veto Case,
69 Mont. 325; 222 Pac. 428.

ARGUMENT

I.

THE ACTS INTERFERE WITH AND IMPOSE A BURDEN UPON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In the statement of the case, we have shown that the license tax is imposed against persons and corporations engaged in the business of operating and maintaining telephone lines and furnishing telephone service, in the State of Montana, and that the tax is specifically laid upon the use of telephone instruments; that the telephone lines and the telephone instruments are used in common for both intrastate and interstate commerce; that the telephone service furnished by appellee in Montana by means of the telephone lines and telephone instruments is of two kinds: first, local exchange and intrastate toll, and, second, toll service involving interstate and foreign commerce; also, that these telephone lines and telephone instruments are integral parts of a comprehensive telephone system used by appellee in the State of Montana rendering these two classes of service. The development of the telephone business, and the common use of these telephone lines and telephone instruments in both intrastate and interstate commerce are matters of such general knowledge that the courts will take judicial notice of them. But, in addition, the evidence is clear and uncontradicted, and the trial court found (R. 25):

> "That the telephone system owned and operated by the plaintiff extends throughout Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico and a part of Texas, and the telephone instruments in Montana are an integral part of this system, and are a part

> of a great system extending throughout the United States and to a great many foreign countries, and each of these telephones (except 45 not affected by said statute) is available for interstate and foreign communication by connection with some 30,000,000 telephones throughout the entire system. * * * "

An analysis of the acts shows that they impose a burden upon interstate commerce, contrary to the Commerce Clause of the Constitution of the United States and the decisions of this court, in two ways: first, by requiring a license tax to be paid by persons or corporations engaged in the business of operating or maintaining telephone lines used in furnishing telephone service in the State of Montana, without making any distinction between intrastate and interstate and foreign service, and notwithstanding the fact that the telephone service so furnished is both intrastate and interstate in character, and is accomplished by operating and maintaining telephone lines used in common in furnishing both of these services; and, in the second place, by imposing the tax upon telephone instruments used, controlled and operated by the telephone company in the conduct of the business of operating and maintaining telephone lines, and furnishing telephone service, which instruments, together with the associated instrumentalities, are used in common in furnishing both intrastate and interstate and foreign service.

(a) *This court has uniformly held that a state may not impose any license or excise tax upon the privilege of engaging in interstate commerce, or upon any of the instrumentalities used in interstate commerce, or for the privilege of using instrumentalities in such commerce.*

We have already shown that the license tax in question is required to be paid by persons and corporations engaged in the business of operating and maintaining telephone

lines, and furnishing telephone service, in the State of Montana, and that the tax is specifically laid upon the use of telephone instruments; that the telephone lines and associated instrumentalities of appellee in Montana, and the telephone instruments, are used in common for both intrastate and interstate commerce. It is unnecessary to argue that a license tax can not be imposed upon the privilege of engaging in interstate commerce.

In the course of the decisions, this court has had occasion to pass upon various attempts by the states and municipalities to impose license or excise taxes directly upon interstate commerce, such as freight and passengers; also upon the use of the bill of lading employed in such commerce, and upon gross earnings derived from interstate commerce. In other cases, the court has had occasion to pass upon attempts to impose such taxes upon the privilege of engaging in interstate commerce, or upon instrumentalities used in common for both intrastate and interstate commerce, such as sleeping cars, express wagons, locomotives, and distributing stations where gasoline and oil are sold. All such attempts have failed. This latter class of cases, we submit, is determinative of the case at bar. No distinction can possibly be made between such facilities as sleeping cars, express wagons, locomotives, and distributing stations used in common for both intrastate and interstate commerce, and telephone lines and telephone instruments which are, under the development of the telephone business, designed for use, and are used in common for both intrastate and interstate commerce. Accordingly, we come directly to the decisions of this court, holding unconstitutional license or excise taxes imposed upon interstate commerce or upon instrumentalities, or upon the privilege of using instrumentalities, when employed in common for both intrastate and interstate commerce.

Pickard v. Pullman Southern Car Co.,
117 U. S. 34;
Barrett as President of the Adams Express Co. v. City of New York,
232 U. S. 14;
Bowman v. Continental Oil Co.,
256 U. S. 642;
New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment,
280 U. S. 338.

In *Pickard v. Pullman Southern Car Co., supra*, the statute provided that the running and using of sleeping cars on railroads in Tennessee, not owned by the railroads upon which they were run or used, was a privilege, and that the company owning and running or using said cars should pay annually $50.00 for each and every such car so used and run over the railroads. The Pullman Company paid the tax, and brought suit to recover it. In this case, as in the case at bar, the tax was not a property tax, but was a tax for the privilege of using an instrumentality in interstate commerce. The court held the statute constituted a burden upon interstate commerce, and violated the Commerce Clause of the Constitution. The court said:

> "The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it

was engaged in interstate commerce, was not taxable by the State of Tennessee."

In *Barrett as President of the Adams Express Co. v. City of New York, supra*, an ordinance was involved which provided a license fee of $5.00 for each express wagon used as a public express, and it was provided that every vehicle "kept or used for the conveyance of baggage, packages, parcels, and other articles within or through the city of New York for pay" should be deemed a public express. The Adams Express Company brought suit to enjoin the enforcement of the ordinance. It was developed in that case that the express wagons used by the company were used both in connection with the company's local business in the city, and, in addition, in connection with the interstate business carried on by the company. The court held the ordinance void and in violation of the Commerce Clause. The court said:

> "But, if the above-mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that, so construed, they would be clearly unconstitutional."

The court then quoted from an earlier case the following:

> "A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *Bowman v. Continental Oil Co., supra*, the statute of New Mexico imposed a license tax upon every distributor of gasoline, of $50.00 for each distributing station, or place of business, or agency. At the several distributing stations of the Continental Oil Company in New Mexico, the com-

pany transacted both local and interstate business. Approximately 94.5 per cent of the business transacted at these filling stations was intrastate, and approximately 5.5 per cent was interstate. The court said:

> "The subject taxed is not in its nature divisible, as in the case of the excise tax."

By the excise tax, the court had reference to a gasoline tax of two cents per gallon, which was in the statute denominated an excise tax. The court further said:

> "The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt." (Citing cases.)

It is interesting in this connection to note that the Attorney General, representing the State of New Mexico, argued that the act should be construed as affecting only intrastate commerce, and apparently other executive and administrative officials of the state had undertaken to construe the statute in that way. But the court said:

> "Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasolene indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute,—that is to say, without authority of law. Hence, it cannot be enforced at all."

In *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra*, a so-called franchise tax was imposed

by the statute of New Jersey against all persons and corporations occupying the highways, which the court in the opinion referred to as streets. The tax was based upon such proportion of the gross receipts of the company in the state as the length of line or mains in the streets bears to the length of the whole line or mains. In other words, the tax here was measured by the length of the line or mains in the streets.

The New Jersey Appellate Court had held that this tax was not a property tax, but was "merely an excise tax," measured in part by gross earnings on its franchise to exist as a corporation, and its franchise to occupy the streets of the state.

This court held that a tax of that character was repugnant to the Commerce Clause. The court said:

> "But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

Here, again, it is interesting to note that an attempt was made by the representatives of the state to avoid the claim of invalidity under the Commerce Clause, on the basis of the language of the Appellate Court of New Jersey, to the effect that the tax was not in fact laid upon the right or privilege to engage in interstate commerce. The court said:

> "The language of the act and the decisions of the courts of the state are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive for, whatever the

terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business."

With respect to the method and basis for assessing the tax, the court said:

"We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void."

In this connection, we refer to the case of *Helson v. Kentucky*, 279 U. S. 245. The statute imposed a tax of three cents per gallon on all gasoline sold within the commonwealth at wholesale. The term "at wholesale" was defined to include any sales made for the purpose of resale or distribution or for use, as well as gasoline furnished or supplied for distribution, within the state; and, also, to mean and include any person who shall purchase or obtain gasoline without the state, and sell, distribute, or use it within the state. Suit was brought to collect an amount claimed to be due under this statute from Helson and his partner, who were engaged in the operation of a ferryboat on the Ohio River, between Kentucky and Illinois. They were engaged exclusively in interstate commerce. The motive power of the ferryboat operated by them was gasoline, all of which was purchased and delivered to them in Illinois. It was stipulated that 75 per cent of the gasoline used in operating the ferryboat was consumed within the limits of Kentucky, but that all of the gasoline so consumed by them in the operation of the ferryboat was in making the interstate journeys. The claim of the state was for the tax upon the gasoline so consumed. The court held that the act, as applied to them, was unconstitutional, and violated the Commerce Clause of

the Constitution. The court said:

> "The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on."

We refer to this case because of the clear statement of the principles applicable to excise taxes where interstate commerce is involved. As having a direct bearing upon the case at bar, we quote the following from the opinion:

> "In Minot v. Philadelphia, W. & B. R. Co., 2 Abb. (U.S.) 323, 343, Fed. Cas. No. 9,645, it was held that a state law imposing a tax for the use within the state of locomotives, passenger and freight cars, and for the use of rolling stock generally, was a license fee exacted for the privilege of such use. It appearing that the larger portion of the locomotives, etc., were used for the interstate transportation of persons and property, the court held that the statute constituted a regulation of such commerce. In the course of the opinion, by Mr. Justice Strong, it is said:
>
> " 'It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, *by taxing the use of means of transportation*, every other may; thus commercial intercourse between states remote from each other may be destroyed.'
>
> "To the same effect is a decision by Mr. Justice Matthews, in respect of a similar state statute imposing a tax for the running or using of sleeping cars within the state in the transportation of interstate passengers. Pullman Southern Car Co. v. Nolan, (C.C.) 22 Fed. 276, 280, 281. On error to this court, the decision was affirmed and the tax condemned as one laid on the right of transit between states. Sub nom. Pickard v. Pullman Southern Car Co., 117 U. S. 34, 46, 29 L. ed. 785, 789, 6 Sup. Ct. Rep. 635."

This comparatively recent case reiterates and approves the doctrine established by the decisions which we have already referred to with some particularity.

(b) *As the telephone business has been developed with the common use of the telephone instruments, poles, wires, switchboards, and other instrumentalities in both intrastate and interstate commerce, the appellee could not discontinue the intrastate business in Montana without withdrawing, also, from the interstate business. For this reason, the acts are invalid, and violate the Commerce Clause of the Constitution of the United States.*

In *Sprout v. South Bend*, 277 U. S. 163, the court, in an opinion dealing with the right of a municipality to impose a license tax upon busses operated in interstate commerce, and in holding the ordinance void, and in violation of the Commerce Clause, laid down the following proposition (opinion by Mr. Justice Brandeis):

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*" (Italics ours.)

In support of this proposition, the court cites many authorities, including the case of *Bowman v. Continental Oil Co., supra.*

It is the fourth and last proposition thus laid down by this court that we consider under this heading, and this statement was repeated in *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465 (opinion by Mr. Justice Butler).

No argument is required to convince this court that the appellee cannot render interstate communication at rates which would not be prohibitive if it should discontinue its intrastate business in the State of Montana. Further, it would have been impossible for appellee to develop its interstate service to its present condition and extent, and it would be impossible to further develop such service, were it not for the intrastate service now being furnished. Upon this proposition the evidence is clear and uncontradicted, that it would not be possible or practicable to separate the Montana business from the interstate or international business. We quote the testimony:

> "It would not be possible to operate separately these two classes of service, because, as I indicated there on the map, the same telephone, the same signaling apparatus, the wires in the building, the drop wires to the cables, and the cables, poles, wires, and underground wires we have in the streets and alleys between our customers and telephone and central-office equipment, are used for all classes of service. It is common usage. Largely, your land, buildings, central-office equipment and operating organization is used in common for all services. We think it is obvious to any one with experience that to separate those classes of service would require a hundred per cent duplication of outside distribution plant and telephones, and a large part of duplication of the central-office equipment. The attendant expense of such a disconnected operation would substantially destroy telephone service as it is known today. Your prices would become prohibitive." (R. 39.)

And the court, in Paragraph 9 of the Findings of Fact, said:

> "That all of said telephones constituting a part of said system in Montana are instrumentalities of

interstate and foreign commerce, and plaintiff could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business." (R. 25.)

It is surprising in the face of this undisputed testimony, and this finding of the trial court, that an argument should be presented to this court that the telephone company in Montana could discontinue its intrastate service without withdrawing also from the interstate service.

It is unthinkable that the present investment and facilities of the company in Montana would ever have been constructed and installed, or that it would or could be maintained for the sole purpose of rendering interstate service, and it is equally unthinkable that it could or would be maintained and operated in the future for that purpose alone. What Mr. Justice Brandeis and Mr. Justice Butler and this court must have had in mind in the use of the language now under consideration, and quoted from *Sprout v. South Bend, supra*, and which was repeated in *East Ohio Gas Co. v. Tax Commission, supra*, was whether the person taxed could discontinue the intrastate business without withdrawing from interstate business, from a practical standpoint. It is hard to conceive of any common business involving both intrastate and interstate commerce, which could not, as a matter of physical fact, be separated. If the necessary consequences are to be disregarded, and all of the practical considerations ignored, intrastate service or operations could be discontinued so as to avoid the payment of the tax, and it would still be physically possible to continue the interstate service or operations. Take, for example, the license tax imposed upon the filling stations, or distributing stations, of the Oil Company in *Bowman v. Continental Oil Co., supra*. The court said: "The subject taxed is not in its

nature divisible." Of course, the court considered the matter in a practical way, because it would be physically possible to have duplicate filling stations or distributing stations—one dealing exclusively in intrastate commerce, and one dealing exclusively in interstate commerce, and it would be physically possible for the Oil Company to discontinue entirely its intrastate business, although it amounted to 95.5 per cent of its total business, and to attempt at least for a time to continue the interstate business.

The situation with respect to the telephone business is unique, and presents the strongest case that can be thought of wherein, as a practical matter, the person taxed could not discontinue the intrastate business without also withdrawing from the interstate business. It is wholly different from such cases as are relied upon by appellants involving brokers and commission merchants.

Appellants, in their Brief (p. 52) construe the language in *Sprout v. South Bend, supra,* which we are considering here, and which, as already indicated, was repeated in *East Ohio Gas Co. v. Tax Commission, supra,* as involving the mere legal right to discontinue intrastate business without withdrawing also from the interstate business. They say:

> "It would seem, therefore, that what the Court had in mind in the *Sprout case, supra,* was that one doing an interstate and intrastate commerce could not be taxed for the intrastate commerce unless he is *legally free* to withdraw from the latter so as to avoid the burden of the tax." (Italics ours).

What the court said in these two cases was that, in order for the tax to be valid, it must appear "that the person taxed *could* discontinue the intrastate business without withdrawing also from the interstate business."

In support of their argument that the court had in mind here a mere *legal* conception rather than a practical conception of the situation, they say that the court was not considering the practicability of withdrawing. What was the court considering when it used this language in the two decisions referred to? It was not considering the mere legal right to withdraw from the intrastate business. And why did the court cite *Bowman v. Continental Oil Co., supra,* among other cases, for this proposition? For it is perfectly clear that the Continental Oil Company had a legal right to withdraw from the merchandising business in which it was engaged in New Mexico, and yet in *Bowman v. Continental Oil Co., supra,* the court said:

"The subject taxed is not in its nature divisible."

Clearly, it was divisible, if the mere legal right to make a division is all that is involved.

Appellants would insert the words "legally could discontinue" for the words "could discontinue." Surely, Mr. Justice Brandeis and Mr. Justice Butler did not both fall into the error, all unnoticed by the Chief Justice and the other Justices, of saying "could discontinue," when they meant, "legally could discontinue."

(c) *The acts make no attempt to discriminate as between intrastate commerce and interstate commerce, and, indeed, it would be impossible to do so. The disavowal of the Attorney General of Montana of any intent to burden interstate commerce does not aid his case.*

The acts make no attempt whatever to discriminate as between intrastate commerce and interstate commerce. They are simply made applicable to all persons and corporations "engaged in the business of operating or maintaining telephone lines, and furnishing telephone service in

the State of Montana," and the license tax is imposed "for each telephone instrument used, controlled and operated by it in the conduct of such business." In connection with every interstate call, either originating or terminating in Montana, telephone lines and a telephone instrument located in Montana are used, controlled and operated by the company in the conduct of such business.

The Attorney General of Montana argues that it was the intention of the Legislature to levy a license tax only upon the domestic or intrastate business of the company. We submit that there is no justification whatsoever for such a contention under the language of the acts. The acts have not been passed upon, on construed by the Supreme Court of the state. In *State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394, 71 Pac. 311, a case decided in 1903, construing a statute passed in 1897 before there was any interstate line in Montana (R. 37), imposing a license tax upon telephone companies in each county where such business is transacted, of 75 cents per year for each telephone instrument in use, the court held that:

> "The evident intention of the Legislature in passing Section 4071 above was to impose the license tax of 75 cents on each telephone instrument *used in purely local or intrastate business*, and that as to instruments used in interstate business it was intended to have no application whatsoever." (Italics ours.)

We mention the year in which the Legislature passed that statute, which was, as shown by the testimony in the case at bar, more than two years prior to the completion of the first interstate telephone line into Montana (date of Statute 1897, and the first interstate line built in September, 1899, R. 37), because at that time no telephone instrument within the State of Montana was an instrumentality of interstate commerce. The legislative intent was, of

course, limited to the situation which existed at the time the act was passed. There could have been no intent to impose a license tax upon telephone instruments used in interstate commerce when there were no instruments used in interstate commerce. It is not strange, therefore, that the court held that the legislative intent was to impose the license tax on each telephone instrument used in "purely local or intrastate business."

Shortly after the decision which we have just been discussing, another case came before the Supreme Court of Montana, involving the validity of a license tax imposed against express companies. The act was general in its terms, and made no discrimination whatsoever as between intrastate and interstate commerce. In holding the statute invalid as violating the Commerce Clause, the court said:

> "The license tax imposed under Section 4074 above is a gross amount imposed upon the entire business of the express company and required as a condition precedent to its engaging in, or following its occupation. The statute does not by its terms attempt to make any discrimination between the local and interstate business of the defendant company, and no such discrimination can be made under any fair construction of the language employed. We hold, therefore, that the statute attempts to impose the license upon the entire business of the company and a portion of that business being interstate in its character, the license is an interference with, and an attempted regulation of, interstate commerce, and is void as in contravention of the constitutional provisions conferring upon Congress sole power to regulate commerce with foreign nations among the several states and with the Indian tribes."
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> *State v. Northern Pacific Express Co.*,
> 27 Mont. 419, 71 Pac. 404.

If the ultimate fact is that a license tax is imposed for

the doing of an interstate business, or for the use of instrumentalities in interstate commerce, the statute is void under the Commerce Clause. This is true, regardless of the wording of the statute, or any claim that may be asserted with respect to it. To illustrate what we have in mind: suppose the statute had provided that it was the intention of the Legislature to impose a license tax upon the right and privilege of the company to engage in intrastate business in Montana, and that nothing in the statute should be construed to impose a license tax upon the right and privilege of engaging in interstate commerce, and the statute then specifically based the tax upon the gross receipts of the company derived from interstate commerce, can there be any doubt that the statute would be unconstitutional, notwithstanding the expessed intent of the Legislature? Likewise, if the statute used the language we have just assumed by way of illustration, after imposing a license tax upon the use of telephone lines and telephone instruments, just as certainly the statute would be void when it is made to appear that the telephone lines and the telephone instruments are instrumentalities of interstate commerce. Accordingly, the Attorney General of Montana serves no purpose in arguing from the language of the statute or otherwise that it was the intention of the Legislature to levy a license tax only upon the domestic or intrastate business of the company.

We have already referred to the case of *Bowman v. Continental Oil Co., supra,* in which this court clearly held that a license tax for the use of an instrumentality employed in both intrastate and interstate commerce indiscriminately at the same stations and by the same agencies, is unconstitutional; that in such a situation it makes no difference that the executive or administrative officers of the state have disavowed any purpose to exact payment of a license tax

for the privilege of engaging in interstate commerce, because the act could not be enforced otherwise than as prescribed therein. As a matter of fact, no administrative officer in Montana has undertaken to interpret or apply the acts in any manner other than as required by the express language of the acts.

We have referred also to *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra,* in which this court referred to the language of the act, and the decisions of the state court construing it, and we quote again at this place this sentence:

> "But neither is necessarily decisive for, whatever the terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business."

In *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, the court said:

> "But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

The case at bar is very different from the two classes of cases relied upon by appellants. In one class of cases cited,

a license or excise tax was imposed in a lump sum, as against a company engaged in both intrastate and interstate business or commerce. In such case it is possible for the statute, or the ordinance, to be so worded as to impose the license or excise tax only upon the privilege of carrying on the intrastate commerce; or the statute, or the ordinance, may be so general in its terms, and so worded as to make no distinction whatsoever between intrastate commerce and interstate commerce. Accordingly, in all such cases it becomes important to construe the statute, or the ordinance, to ascertain whether the legislative intent was to impose the tax only upon the privilege of doing the intrastate business, or whether the legislative intent was to impose the tax upon the privilege of engaging in both classes of business. Where there is any ambiguity in the statute, this court would consider the administrative rulings and any decision of the highest court of the state involving the construction of the statute. Falling into this class are the following cases cited by appellants:

Osborne v. Florida, 164 U. S. 650, involving a license or excise tax upon express companies in a flat sum.

Postal Telegraph-Cable Co. v. Charleston, 153 U. S. 692, involving a like tax upon telegraph companies.

Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124, involving a like tax upon telegraph companies.

Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, involving a like tax upon telegraph companies.

Keher v. Stewart, 197 U. S. 60, involving a like tax upon agents of packing houses.

Raley and Bros. v. Richardson, 264 U. S. 157, involving a flat tax upon brokers or commission merchants.

The other class of cases involves a license or excise tax upon companies engaged in both intrastate and interstate commerce, where the tax is based upon, or measured by, the gross earnings of the company. Typical of such class of cases is *Express Co. v. Seibert*, 142 U. S. 339, cited by appellants.

In case of ambiguity in such a statute, or ordinance, it becomes important to determine whether the legislative intent was to base or measure the tax by the total gross earnings of the company in both classes of business, or whether it was the legislative intent merely to base the tax upon, or measure it by, the gross revenue derived from intrastate commerce. Accordingly, in such cases we have a pure question of statutory construction—a mere question of legislative intent, and in such cases this court would give consideration, in case of ambiguity, to administrative rulings, and to the decision of the highest court of the state construing the statute or ordinance.

But in the case at bar, where the language of the Acts is clear, and imposes a license or excise tax upon telephone instruments, which this court judicially knows, and which the undisputed evidence and the findings in this case show, are instrumentalities of interstate commerce, designed for such use and actually so used, no administrative ruling, nor any disavowal of intent to interfere with interstate commerce *(Bowman v. Continental Oil Co., supra)*, nor even the language of the statute itself, nor any construction placed thereon by the highest court of the State *(New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra)*, will prevail in this court against a claim based upon the Commerce Clause of the Constitution of the United States. None of the cases where a license or excise tax was imposed in a flat sum, or upon gross receipts, have any appli-

cation to, or bearing upon, the case at bar. Here, it is not a question of what the Legislature intended, or what the Attorney General of Montana claims with respect to the legislative intent. It is a question of what the Legislature did, and what the Legislature did was to impose a license or excise tax upon instrumentalities employed in interstate commerce.

If the license or excise tax is imposed upon instrumentalities used in interstate commerce as so much per express wagon, or so much per Pullman car, or so much per locomotive, or so much per distributing station, or so much per telephone, and the fact is, that the express wagons, or the Pullman cars, or the locomotives, or the distributing stations, or the telephones, are used in both intrastate and interstate commerce, no amount of discussion or argument or disavowal of intent to interfere with interstate commerce, or administrative ruling or interpretation, or even judicial construction of the statute or ordinance by the highest court of the State, will save the statute, or the ordinance, from coming in conflict with the Commerce Clause of the Federal Constitution.

(d) *Some observations with respect to appellants' brief on the interstate commerce feature of the case.*

Notwithstanding the plain language of the original act (R. 9), requiring payment of "a license tax in the amounts following *for each telephone instrument used* • • • based upon the *number of telephone instruments* • • •," and the language of the amended act (R. 10), requiring payment of "a license tax in the amounts following *for each telephone instrument* used, controlled and operated by it in the conduct of such business: A license tax of Two Dollars ($2.00) *for each such instrument*" (italics ours), appellants attempt to argue that the acts impose a tax upon telephone instru-

ments, in form only. They conveniently assume that it is in fact a tax upon intrastate business only, measured by the number of telephones in intrastate use, and without regard to any interstate use of such instruments. They urge the court to be ingenious, and, by some legerdemain of construction, throw out of the acts such language as "a license tax in the amounts following for each telephone instrument used," and substitute therefor a license tax on intrastate business only. They clothe their prayer for such ingenious construction in the respectable language of an old, well-established rule of construction—that the court should look through form to substance, but this ancient canon is capable of no such perversion. Of course, the same argument was just as appropriate with respect to the Pullman cars in the case of *Pickard v. Pullman Southern Car Co., supra,* and with respect to the express wagons in *Barrett as President of the Adams Express Co. v. City of New York, supra,* and with respect to the distributing stations in *Bowman v. Continental Oil Co., supra,* and the miles of wire in *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra;* but the court was not misled by any such argument in any of these cases.

Further, appellants seek to argue that the tax is laid exclusively on revenues derived from local business, because the acts identify the telephone instruments to be taxed by reference to the monthly charge to the customer. The tax, however, is not laid as a percentage or portion of that monthly rate. The tax is in the same amounts for the use of instruments, where the monthly charge is above the stated minimums, regardless of the actual charges for the local business, or the returns from that local business. For example: under the act as amended, the tax for the use of an instrument by a subscriber at his residence is $2.00 per an-

num, without regard to whether the monthly rate paid by the resident subscriber is $2.25, or $3.00, or $5.00, or any other sum in excess of the stated minimum of $2.00, and the tax is the same whether an instrument is used one month or a year. Consequently, it must follow that the tax has no relation whatever to the intrastate revenues. The monthly rate is only used by the Legislature in purported justification for identifying and discriminating between the instruments that are, and those that are not, to be subject to the license tax. Here, it is to be remembered that the record indisputably establishes that each instrument is used, or is capable of being used, not only in local exchange service, but also for intrastate toll service, and interstate and foreign toll service. The acts exact the license tax for the use of the instrument, without regard to whether its use is for exchange service, for intrastate toll, or for interstate and foreign toll service. Once the instrument is identified as being taxable under the acts by reference to the monthly charge, then it is subject to the license tax, although in fact it might never be used except exclusively in interstate or foreign toll service.

II.

THE ACTS DENY TO THE COMPANY THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a) *Because of the exceptions therefrom of telephone instruments as therein stated.*

Both the original act and the amended act provide for the exemption of instruments from the tax, where the rate charged the customer therefor does not exceed $2.00 per month for residence telephones, and in the original act,

$3.00 per month for business telephones (which in the amended act has been increased to $4.00 per month for business telephones). The original act also has a graduated scale for the first seventy-five telephones, being ten cents per telephone for the first twenty, twenty cents for the next fifty-five, and One Dollar for each instrument over seventy-five. These exemptions have the practical effect of exempting fifty of the sixty-four telephone companies operating in Montana (R. 36).

No evidence was submitted by appellants justifying, or attempting to justify, this discrimination between telephone companies operating in the State of Montana, and we submit that no evidence could have been presented that would justify this obvious discrimination, for this court has recognized that it is a peculiarity of the telephone business that the expenses of conducting that business in larger exchanges are higher per station than are the expenses in the smaller exchanges.

Railroad Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414.

Subclassification of telephone companies on the basis of the rates charged, and the exemption of those telephones for which a lesser rate is charged is without basis in law or fact, and such subclassification is such a denial of the equal protection of the laws as was denounced by this court in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517. In that case, the Florida statute imposed upon every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores within the state under the same general management, supervision or ownership, a license fee for the privilege of carrying on such business, measured by the number of stores maintained

or operated, the fee being fixed at $5.00 for one store, $10.00 each for two or more, but not exceeding fifteen stores where the same were located in any one county, $15.00 for each additional store from two to fifteen where the same were located in different counties, and so on, the fee for each store being stepped up in amount as the number constituting the chain reaches certain specific limits. The act imposed a tax only on retail stores, and excluded from the definition of a store filling stations engaged exclusively in the sale of gasoline and other petroleum products. The act also imposed a levy of $3.00 for each $1,000.00 of value of stock carried in each store, or for sale in each store, and this was defined to include merchandise owned by the taxpayer, and held in storage to be sold in or through such store. This court re-affirmed its holding in *State Tax Commissioners v. Jackson,* 283 U. S. 527, which held that under the facts established in that case, there was such a difference in the method and character of the business of chain stores, as distinguished from that of a retail store individually owned, that the Legislature was justified in making that "distinction the occasion of classification for the purposes of taxation," but held that where the Legislature went farther and attempted to subclassify chain stores themselves, and to impose upon chain stores operating in several counties a higher tax than upon those operating only in one county, and there was no reasonable basis in fact for such subclassification, the act of the Legislature was unreasonable and arbitrary, and denied the equal protection of the laws, guaranteed by the Fourteenth Amendment. We can see no difference between that sub-classification of chain stores, which was attempted to be made by the Florida statute considered in the Liggett Case, and the subclassification of telephone companies, attempted to be made by the Montana acts now under consideration.

In *Cotting v. Godard*, 183 U. S. 79, this court held that a stockyards company is denied the equal protection of the laws by an act which limits the amount of charges to be made by that corporation, without limiting the charges to be made by other similar, but smaller corporations, doing a smaller amount of business, and without any reference to the character or value of the services rendered, even though the statute was general in its terms, and was made applicable to any corporation doing business of a certain amount. It was held that such a statute makes a positive and direct discrimination between persons engaged in the same class of business, the only difference being the quantity of business which each may do. The act there under consideration exempted from its operation stockyards wherein less than one hundred head of cattle a day were received. This court said (P. 112):

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other. * * * This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, this

court held void a statute imposing a privilege tax upon mortgages lodged for record, where the indebtedness secured thereby did not mature within five years. No tax was imposed where the indebtedness matured within five years. This court, while recognizing that the power of the state to classify for purposes of taxation is of wide range and flexibility, stated:

> "That the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' * * * That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * * Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

This court recognized that the privilege of recording the short-time lien, and that of recording the long-time lien had different taxable values, but said:

> "But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.
>
> "Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is

> paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary."

The Montana Supreme Court has recognized that under the constitution of that state, as well as the Constitution of the United States, license taxes cannot be discriminatory as between individuals of a class.

Hale v. Treasurer Mineral County,

82 Mont. 98, 265 Pac. 6.

The court there had under consideration a statute imposing a license tax upon livestock coming into the state to graze for any length of time whatsoever. The court held this statute unconstitutional and discriminatory, because the tax did not apply to livestock brought into Montana to be fed in pens, but only applied to those brought in for grazing purposes. The court, in considering one of its earlier decisions, which held that the license system was not controlled by the equality and uniformity requirements of the Constitution, said:

> "But it does not follow that in imposing a license tax, the Legislature may disregard the principles of uniformity and equality altogether; it may not resort to unreasonable or arbitrary discrimination."

No facts have been disclosed by the appellants, justifying the discriminatory classification contained in the acts, as was done in the cases relied upon by them, nor is this a case where the distinction, upon which the classification is made, is obvious, as in the case of the exemption contained in *Armour & Co. v. Virginia*, 246 U. S. 1, cited by appellants. We are not contending that that portion of the amended act which exempts mutual companies denies the appellee the equal protection of the laws, for that such an exemption can be made seems to have been established by

this court in *Citizens Tel. Co. v. Fuller*, 229 U. S. 322; but we submit that the unreasonable and arbitrary attempted subclassification of telephone companies upon the basis of the rates charged, and the exemption of certain other telephones thereunder, has no basis in law or fact, and denies to appellee the equal protection of the laws.

(b) *The penalties imposed by the Acts are so severe and excessive as to deny to the company the equal protection of the laws.*

Section 3 of the original Act provides:

> "Any violation of any of the provisions of this act shall be deemed a misdemeanor, and shall be punished by a fine of not more than $1,000, and by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

This section of the original act is applicable to the amended act.

Appellants contend in their brief that the penalties imposed by the Montana acts are not so excessive and severe as to constitute a denial of the equal protection of the laws within the rule pronounced by this court in *Ex parte Young*, 209 U. S. 123, and other cases. It is true that in *Ex parte Young* the amount of the penalty was larger than that imposed by the Montana act, but the court did not consider the amount of the penalty alone as the determining factor. The sale of each railroad ticket above the price permitted by the act there under consideration would be a violation thereof. In Montana, we have two acts which attempt to exact from the appellee two license taxes within the same year. Appellee is required to pay a license tax "for each telephone instrument used, controlled and operated by it in the conduct of such business." Under the first act, it is not permitted to pass this tax on to the consumer, but it is required that the tax "shall be borne entirely by the own-

ing and operating concern." By the second act, appellee is prohibited from showing the tax in any manner on any statement or account rendered to the subscriber. If it pays the tax under the original act, but attempts to charge that tax to operating expenses, it would be guilty of a violation of the act, and subject to the penalties thereby imposed. If it refuses to pay the tax imposed under the first act, it is subject to the penalties, and if it refuses to pay the second tax, it has violated the statute, and is again subject to the penalties. If it pays the tax under the second act, and shows the amount of that tax on a statement sent to a subscriber, it has violated the statute, and incurred the penalties. If the statute were construed as this court construed the statute considered in *Ex parte Young*, so that the failure to pay a license tax "for each telephone instrument" constituted a separate violation of the act, it would be subjected to such severe penalties that the aggregate of those penalties might exceed the value of its properties in the State of Montana. In this connection, it is important to note that the acts do not purport to impose a license tax for the privilege of doing a general telephone business in the state, but that they exact the payment of a tax for using, controlling and operating separate telephone instruments, which are essential in the conduct of the general telephone business.

The case upon which appellants rely principally is that of *Rast v. Van Deman and Lewis*, 240 U. S. 342, where they say the penalties are the same as that imposed by the Montana acts. They are not identical, however, for while the amount of the fine and the term of imprisonment is the same, the statute under consideration in that case did not permit the imposition of both the fine and imprisonment; and, further, it is apparent that the situation which there confronted those contesting the statute, in no way compares with the situation which confronts the appellee. The issue there pre-

sented seems to have been limited to the imposition of a single penalty. Appellee here is confronted with the imposition of many penalties.

While in *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, the statute specified the sum of $500.00 as "liquidated damages," this court seems to have considered it as being in the nature of a penalty, and by virtue of the fact that it could be successively imposed, it was held to be arbitrary and oppressive, and therefore unconstitutional. We do not contend that the court expressly held in that case that the statute denied to the Railway Company the equal protection of the laws, but cite the case as illustrating the principle laid down by this court in *Ex parte Young*.

The other decision of this court relied upon by appellants is *Rail, etc., Coal Co. v. Yaple*, 236 U. S. 338. There, only a fine in an amount from $300.00 to $600.00 was under consideration.

In *State v. Crawford*, 74 Wash. 248, 133 Pac. 390, a statute imposing a penalty consisting of imprisonment for not to exceed one year, or a fine not to exceed $1,000.00, or both, was held unconstitutional, as denying the equal protection of the laws. This decision is subsequent to *State v. Oregon, etc. Co.*, 68 Wash. 160, 123 Pac. 3, cited by appellants in their brief.

Summing up the argument under Subdivision II, we respectfully submit, that by reason of the arbitrary subclassification of telephone companies attempted to be made by the acts under consideration, whereby less than one-fourth of the telephone companies operating in the State of Montana are affected by the acts, and by reason of the excessive, arbitrary and oppressive penalties imposed, the acts deny to the appellee the equal protection of the laws, guaranteed to it by the Constitution of the United States.

III.

THE ORIGINAL ACT CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT PROVIDED THAT THE LICENSE TAX SHOULD IN NO MANNER AFFECT THE RATES CHARGED THE PATRONS OF THE COMPANY, BUT SHOULD BE BORNE ENTIRELY BY THE COMPANY.

There is no doubt about such a tax constituting an expense which must be taken into consideration in determining reasonable rates.

Galveston Electric Co. v. Galveston,
258 U. S. 387;
Consolidated Gas Co. v. Newton,
267 Fed. 231.

To prohibit the company from charging such a tax as an expense in the establishment of rates, constitutes a taking of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. We take it that appellants concede this proposition.

On Page 9 of appellants' brief, they say:

> "The statute does not prevent the charge of the tax to operating cost. If a clause in the original act so provided, that clause may be void without rendering the whole act unconstitutional."

Accordingly, we need not further argue this question. Appellants do suggest that inasmuch as the company has not made application to the Public Service Commission for increase in rates, it cannot complain. The suggestion that

the remedy of the company in such case is to ignore the act and the penalties and apply to an administrative body to disregard a plain, legislative provision or to declare it unconstitutional, is certainly a novel argument, and requires no answer.

It is suggested, however, that the invalidity of this provision does not render the whole act unconstitutional. We deny that this is a separable provision, and that its invalidity does not result in the invalidity of the act as a whole. The Legislature, in passing the act, manifested a very definite purpose that the ratepayers should in no manner be charged with the expense involved, but that the company itself should stand the expense. How can a court say that the Legislature would have passed the act without the void provision, with the result that one of the important things sought to be accomplished by the Legislature would have been entirely unavailing?

The courts are loath to consider the provisions of an act separable, and even where the Legislature itself has declared that if any portion of the act shall be held unconstitutional, it shall not affect the validity of the remaining portions of the act, the courts still proceed with great caution in the determination of the question. The general rule is well stated in *Williams v. Standard Oil Co.*, 278 U. S. 235. The court said:

> "But the general rule is that the objectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it, and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.' "

And again, quoting from a previous decision:

> "In seeking the legislative intent, the presumption

is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process."

IV.

THE ACTS IMPAIR THE OBLIGATION OF THE CONTRACT WITH APPELLEE, RESULTING FROM THE CONSTRUCTION OF A TELEPHONE SYSTEM IN MONTANA, PURSUANT TO THE RIGHT GRANTED BY SECTION 14, OF ARTICLE XV, OF THE MONTANA CONSTITUTION.

It is alleged in the complaint (R. 2), and admitted by the appellants in their answer (R. 13) that the State of Montana, under and by virtue of Section 14, of Article XV, of the Constitution of said state, and Sections 6645 and 6646, of the Revised Codes of Montana of 1921, granted to the appellee "the right to maintain and operate telephone lines and a telephone system in the State of Montana," and that that grant has been accepted by the appellee, and that appellee has constructed, and is maintaining and operating, a comprehensive telephone system in Montana, which is a part of a system extending throughout the states of Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas. Appellants concede that the acts in question require the payment of a license tax for the privilege of engaging in the telephone business in Montana, at least in so far as the intrastate business is concerned. We have contended that this act imposes a license tax for the use of telephone instrumentalities, which instrumentalities are necessary in the conduct of telephone business. Without

the use of those instruments there is a practical denial of the right to engage in the telephone business in the State of Montana. Appellants do not deny that the tax is imposed for the privilege of doing such a telephone busniess, claiming only, as we understand it, that the tax is for doing an intrastate telephone business. Appellants argue, however, that Section 7, of Article XII, of the Montana Constitution, authorizes the imposition of a license tax of this character, irrespective of the provisions of Section 14, of Article XV. The Supreme Court of Montana has held, however, that Section 7, of Article XII, has reference only to a property tax. In the case of *Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, at 495, 72 Pac. 982, at 985, it is said:

> "Section 7, of Article XII, of the Constitution provides, among other things, that 'the power to tax corporations or corporate property shall never be relinquished or suspended.' The evident meaning of this constitutional provision is that the property of corporations shall bear its equal share of the burdens of taxation, and that the provisions of Section 1 of this article of the Constitution, that the Legislature 'shall prescribe such regulations as shall secure a just valuation for taxation of all property' applies to artificial, as well as to natural persons."

Appellants have admitted in their answer (R. 12) that all such general property taxes then due, imposed by the State of Montana, have been paid by the appellee (R. 6), and that appellee has also paid license taxes due and payable under and by virtue of Sections 2296 to 2304, inclusive, of the Revised Codes of Montana of 1921, as amended, which is a general license tax, imposed alike on all corporations, foreign or domestic, for doing business as such in the State of Montana. The right of the state to impose these taxes is not in issue.

Section 14, of Article XV, of the Constitution of Montana, reads as follows:

> "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

The Supreme Court of Montana has declared that this section was incorporated in the Constitution because of the importance to the people of this means of communication.

Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102, 116; 29 Pac. 883.

The legislative assembly of Montana, in compliance with the command of this section, enacted Sections 1000 and 1001 of the Civil Code of Montana of 1895, reading as follows:

> "Section 1000. A telegraph or telephone corporation, or a person, is hereby authorized to construct such telegraph or telephone line or lines from point to point along and upon any of the public roads, by the erection of necessary fixtures, including posts, piers and abutments, necessary for the wires; but the same shall not incommode the public in the use of said roads or highways.
>
> "Section 1001. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph or telephone within this state, and connect the same with other lines, and in case such persons or corporations can not agree as the compensation to be paid for the privilege of such connection, the acquiring of the right by the one to use the

line of the other may be had in proceedings under the code of civil procedure and the damages assessed and the right of connection granted, as provided in the code of civil procedure."

Section 1001 now appears as Section 6646 of the Revised Codes of Montana of 1921.

Section 1000 was amended by including electric light and power lines, and, as amended, now constitutes Section 6645 of the Revised Codes of Montana of 1921.

By the construction of this telephone system in Montana, the right granted by said section of the constitution and statutes was accepted, and a contract resulted, which is protected from impairment by Section 1, of Article X, of the Constitution of the United States.

Russell v. Sebastian,
233 U. S. 195.

In the case just cited, the court had under consideration a provision of the Constitution of California authorizing the construction of lighting and water systems in the cities of that state. The court, in the opinion, said:

"When the voice of the state declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public s rvice and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court." (Citing cases.)

Whether the statute in question impairs the obligation of the contract with appellee involves an inquiry as to the power of the legislative assembly of Montana to impose such a license tax upon the exercise of the right or franchise granted. It is our contention that Section 14, of Article XV, of the Constitution, prohibits the legislative assembly from enacting any statute which does not "give full effect" to the section and the right or franchise granted, and that the imposition of such a license tax burdens or impairs the right or franchise instead of giving any effect thereto.

Section 29, of Article III, of the Montana Constitution, provides:

> "The provisions of this constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."

This section of the Constitution was construed in the case of *In re Weston*, 28 Mont. 207, which involved the question of the power of the legislative assembly to extend the jurisdiction of the Supreme Court of the state beyond that conferred by the Constitution. The court, in the opinion, in referring to the declaration in Section 29, of Article III, said:

> "This declaration can have but one meaning—that, with reference to these subjects upon which the Constitution assumes to speak, its declaration shall be conclusive upon the legislature, and shall prevent the enactment of any law which has for its purpose the extension or limitation of the powers which they confer."

In the case of *State v. Helena W. W. Co. ,et al.*, 43 Mont. 169, 173, which also involved the question of jurisdiction of the Supreme Court of the state, it is said:

> "The rule of interpretation to be applied in order to ascertain the limits of this jurisdiction is embodied

in the maxim, '*Inclusio unius est exclusio alterius;*' for in the Declaration of Rights this rule of interpretation is declared as follows: 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' (Article III, Section 29.)"

See also:

Johnson v. City of Great Falls, et al.,
38 Mont. 369, 373.

This rule of construction of the Constitution of Montana was recognized and applied in the case of *State v. City of Helena,* 34 Mont. 67, in which it was decided that an amendment of Section 1000 of the Civil Code of Montana of 1895, providing "that the provisions of this act shall not apply to public roads and highways within the limits of incorporated cities or towns" was violative of Section 14, of Article XV, for the reason that it did not "give full effect to the grant contained in the section." In the opinion (p. 72), the court said:

"The Constitution commands the legislature to enact a law upon the subject; but, if the legislature refuses to do so, there is not any way to enforce the command. If, however, the legislature does act, the law which it enacts must be a general one of uniform operation, providing reasonable regulations which will *give full effect* to the grant contained in the section of the Constitution quoted above." (Italics ours).

In the case of *Butte v. Montana Independent Telephone Co.,* 50 Mont. 574, it was decided that Section 14, of Article XV, does not restrict the police power of the state, and that a city ordinance requiring telephone wires in the congested business district of a city to be placed underground, was valid. After quoting Section 14, of Article XV, the court, in the opinion, said:

"All power is reserved to the people unless provision is made to the contrary. Our legislature may enact laws upon any subject, unless the Constitution of this state or the supreme law of the land presents some obstacle. *In the first portion of the section quoted above, the Constitution has withheld one subject from legislative interference.* The right of a corporation or an individual to construct and maintain telephone and telegraph lines in this state and connect with other lines is specifically granted. It is true that this granting clause is not self-executing; and while the legislature might by its failure to act render the grant useless, *it cannot by any legislative action impair the right, or interfere with its exercise.* (State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor, etc. of the City of Red Lodge, above.) The provision quoted, however, does not assume to confer power upon the legislature. After defining the grant, the language is: 'And the legislative assembly shall by general laws of uniform operation provide reasonable regulations to give full effect to this section.' The term 'regulations' is not employed in any restrictive sense. It means 'rules.' But the legislature is not enjoined to make all needful rules for the management or control of telegraphs and telephones, *but only such rules as are necessary to make the grant effective.* Any statute which would enable a telephone company, a telegraph company, and any individual or individuals engaged in the telegraph or telephone business, to build, equip and operate necessary lines and connect with other lines, would meet fully the constitutional requirement, as for instance, a statute empowering such a corporation or individual to invoke the power of eminent domain and to use or cross the public thoroughfares. Such effective legislation was enacted in 1895 (Secs. 1000, 1001, Civ. Code; Sec. 2211, Code Civ. Proc.); but the manner in which the right, when made effective, should be exercised was left for proper legislative control without restriction. *In State ex rel. Crumb v. City of Helena*, above, *we construed this constitutional mandate to require only such legislation as would give full*

force and effect to the grant; and we are satisfied that the construction was the correct one." (Italics ours.)

The license tax in question is for revenue, and an exercise of the taxing power as distinguished from the police power. This is admitted. (Appellants' Brief, P. 81.)

In the case of *In re Johnson*, 137 Cal. 110, 69 Pac. 971, the Supreme Court of California had under consideration a constitutional franchise to lay and maintain gas pipes in the streets of a city. The court, in the opinion, said:

> "When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality, where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise. The Constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one; and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of, its exercise."

In the case of *Town of Suisun City v. Pacific Gas & Elec. Co.*, 35 Cal. App. 380, 170 Pac. 1078, it was decided that a city is without authority to require payment of a percentage of the gross returns from the operation of a utility pursuant to a constitutional franchise. The court, in the opinion, on a rehearing, said:

> "Indeed, since the Constitution itself directly grants to public service corporations engaged in the generation and manufacture and sale of electricity and gas the right to enter the streets and other thoroughfares of a city and use the same for the laying down of their pipes, etc., for the purpose of supplying gas and electricity to the inhabitants of such city for lighting

or illuminating purposes, we cannot see how it may or could consistently be held that the right so granted may in any way be hampered or impaired or qualified by any act of such city; and certainly such might well be held would be the effect of a ruling that the city may exact a charge from such corporations for supplying gas or electricity, or both, to the inhabitants of such city for use for illuminating purposes."

To the same effect, see:

City of Oakland v. Great Western Power Co.,
186 Cal. 570, 200 Pac. 395.

If the legislative assembly of Montana can make the exercise of the right or franchise granted subject to the condition of payment of a license tax, then, as said by the Supreme Court of California, other conditions might be attached, and the right or franchise granted, rendered useless.

By reference to the provision of the Constitution of California, considered in the foregoing cases, and quoted in the opinion in the case of *Russell v. Sebastian*, 233 U. S. 195, it will be seen that there was no express prohibition against the city imposing conditions upon the exercise of the right or franchise granted by the Constitution.

If the legislative assembly can now legally impose this license tax, it could have provided, in the legislation enacted pursuant to the command of Section 14, of Article XV, that the right granted by said section could be exercised only upon the payment of such a license tax. Would such a provision be considered as giving full effect to the right granted?

We are unable to distinguish between the effect of the imposition of such a license tax upon the right granted by said section of the Constitution, and the effect of imposing

a license tax upon the business of engaging in interstate commerce. The theory upon which a license tax imposed upon such a business is unconstitutional is that it is a burden upon such commerce, and an infringement or impairment of the right to engage in such business.

As has been said by this court many times, if the power to impose a license tax of this character exists, there being no limit to the amount of such a tax, it might be made so large as to render the grant valueless, and nullify the intent of the people in incorporating such a provision in the Constitution.

Philadelphia & Reading R. R. Co. v. Pennsylvania,
15 Wall. 232;
Pickard v. Pullman Co.,
117 U. S. 34;
Leloup v. Port of Mobile,
127 U. S. 640.

It, of course, must be conceded that if the legislative assembly of Montana is without power to impose such a license tax, the imposition of such tax is in violation of Section 10, of Article I, of the Constitution of the United States, for the reason that it impairs the contract of appellee, resulting from the acceptance of the grant by the construction of its telephone system. Furthermore, the acts, by failing to "give full effect" to Section 14, of Article XV, of the Montana Constitution, is in violation of that section.

Assuming, for the purposes of this argument, however, that in spite of the mandatory provisions of the Constitution, the Legislature has the power to impose a license for the doing of a telephone business, nevertheless the acts in question violate this provision, for the reason that neither is a "general law of uniform operation." This constitutional

provision must necessarily embrace all telephone lines, including those which are excluded by the acts in question. Section 14, of Article XV, of the Montana Constitution, can only mean that any law affecting those operating telephone lines must apply to all telephone lines.

State v. City of Helena, supra.

This constitutional provision having made a classification of all telephone lines, the legislative assembly is without authority to make any different classification, or to exclude from the operation of the acts the other telephone companies.

V.

THE ACTS VIOLATE SECTION 10, OF ARTICLE XII, OF THE MONTANA CONSTITUTION, IN THAT THEY DIRECT THE TREASURER OF THE STATE OF MONTANA TO PAY MONEYS OUT OF THE TREASURY OF THE STATE WITHOUT SPECIFIC APPROPRIATIONS HAVING BEEN MADE THEREFOR BY LAW.

The original act required the company to pay this money to the State Treasurer, and he in turn was required to apportion it to the county treasurers, according to the number of telephone instruments in use from time to time in the respective counties of the state. The amended act requires him to credit the moneys to the Emergency Relief Fund. The Montana Constitution, Section 10, Article XII, provides:

> "All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

The Supreme Court of Montana, in *State v. State Board Examiners*, 74 Mont. 1, 238 Pac. 316, at 321, defined a "specific appropriation" as follows:

> "A 'specific' appropriation is defined in 36 Cyc. 892 as follows: 'A specific appropriation is an act by which a named sum of money is set apart in the treasury and devoted to the payment of particular claims or demands. The appropriation must be specific as to the amount or fund appropriated, and as to the object for which the appropriation is made, it being sufficient, however, if the amount is capable of being determined, and it is not essential that the amount be certainly ascertained prior to the appropriation.'"

Appellants apparently concede that the acts make an "appropriation." That the appropriation cannot be said to be specific, either as to the amount or fund appropriated, or as to the object for which the appropriation is made, is apparent. Under the original act, the determination of the object for which the appropriation is made was left for the counties to determine. Under the act as amended, the determination of the object for which the appropriation is made is left to those having charge of the Emergency Relief Fund. That the amount of the appropriation is indefinite, and, therefore, not specific, is readily evident, for it would be impossible for even the appellee to undertake to predict the number of telephones within the state during the ensuing year, which would be subject to the license tax. By Article III, Section 29, of the Montana Constitution, it is stated that the provisions of the state Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

VI.

THE ACT AS AMENDED VIOLATES THE MONTANA CONSTITUTION, BECAUSE THE AMOUNT THEREBY APPROPRIATED AND TO BE CREDITED TO THE EMERGENCY RELIEF FUND IS NOT SPECIFIED, AS REQUIRED BY SECTION 10, OF ARTICLE XII.

The act as amended further violates Section 10, Article XII, of the Montana Constitution, in that the amount thereby appropriated that is to be credited to the Emergency Relief Fund, is not specified, but that amount is apparently left to be determined by the Governor of the state. In *Re Pomeroy*, 51 Mont. 119, 151 Pac. 333, the Supreme Court of Montana had under consideration a statute which directed that if a lawful claimant establish his title to money held by the state in its treasury, and claimed by it as an escheat, the judgment in the proceeding should order the auditor to draw his warrant on the treasury for the payment of the same. The court held this statute unconstitutional, as violative of Section 34, Article V, holding that while there appeared "to be no objection to the statute in so far as it authorizes the petitioner to establish his right to the property as a claim against the state which in equity and good conscience it ought to discharge," it should be left "to subsequent legislative assemblies to provide by adequate appropriations for such claims as they arise and are adjudicated."

In *Peabody v. Russell*, 302 Ill. 111, 134 N. E. 150, the Supreme Court of Illinois had under consideration a statute which attempted to appropriate $500,000.00 for "reserves" to be expended by the Director of Finance on the approval of the Governor. The court held this unconstitutional, as

violative of Article V, Section 16, of the Illinois Constitution, requiring appropriation bills to specify the objects and purposes for which made, and also upon the ground that it sought to delegate to an administrative officer the specification of objects and purposes, and the determination of distinct items therefor.

See also *Journal Publishing Co. v. Kenney*, 9 Mont. 389, 24 Pac. 96.

VII.

THE ACTS ARE SPECIAL LAWS FOR THE ASSESSMENT OR COLLECTION OF TAXES, IN VIOLATION OF ARTICLE V, SECTION 26, OF THE MONTANA CONSTITUTION.

Article V, Section 26, of the Montana Constitution, provides:

> "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * for the collection or assessment of taxes * * * ."

The practical operation of the acts under consideration is such that they affect only fourteen of the sixty-four telephone companies operating in Montana. The acts, therefore, while general in form, are special in effect.

In *Ark-Ash Lumber Co. v. Pride and Fairley*, 162 Ark. 235, 258 S. W. 335, at 336, the Supreme Court of Arkansas, in considering a statute of this nature, which appears to be general in form, but special in effect, said:

> "In determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation, rather than to its title, form or phraseology, because otherwise prohibitions of the fun-

damental law against special legislation would be nugatory."

The Supreme Court of Montana has said that it is not what a statute includes that determines whether or not it is a special law, but that it is what it excludes.

In *State v. Hays*, 86 Mont. 58, 282 Pac. 32, at 36, it defined a special statute as follows:

> "A special statute is one which relates to particular persons or things of a class (In Re Church, 92 N. W. 1) or one made for individual cases and for less than a class (Guthrie Daily Leader v. Cameron, 3 Okla. 377, 41 Pac. 635), or one which relates and applies to particular members of a class, either particularized by the express terms of the act, or separated by any method of selection from the whole class to which the law might but for such limitation be applicable (State v. Cooley, 56 Minn. 540, 58 N. W. 150).
>
> "The test of a special statute is the appropriateness of its provisions and the objects that it excludes. It is not, therefore, what a law includes, but what it excludes that determines whether it is special. Budd v. Hancock, 66 N. J. Law, 133, 48 Atl. 1023."

While in that case, the statute under consideration was held not to be a special law, in *State ex rel. Redman v. Meyers*, 65 Mont. 124, 210 Pac. 1064, the court held a statute void as special legislation, which operated only upon existing districts, divided by the creation of new counties, as have been, or might be created, under certain enumerated statutes, and impliedly excluded from its operation all existing districts which had been, or might be, divided by the creation of counties by direct legislative act.

In *State v. Miksicek*, 225 Mo. 561, 125 S. W. 507, the Supreme Court of Missouri had under consideration a statute which regulated the hours of labor permitted in a bis-

cuit, bread, or cake bakery or confectionery establishment. The court held that since the statute had no application to pie and pastry bakeries and confectioneries, or to cracker bakeries, it was a special statute, and, therefore, unconstitutional. The court, in quoting from an earlier decision, said:

> "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each."

In *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, that same court held unconstitutional a statute which, by an ingenious method of classification such as was resorted to in the Montana acts under consideration, required department stores to pay considerably larger fees or taxes than other stores. The court said:

> "While the legislature, under its vested authority and power, may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the Constitution, or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law' by which alone the liberty of the citizen may be restrained, or his property burdened or disposed of. * * * Such classification is wholly without reason or necessity."

A constitutional provision of this character embraces not only general taxes, but it embraces every method of raising money by the exercise of the power of taxation, and includes license taxes.

Pedro v. Grootemaat,
174 Wis. 412, 183 N. W. 153;
State v. Ashbrook, supra.

Other cases in which the courts have held acts of this character void, because they are a special law, are:

State v. Baltimore & Ohio R. Co.,
113 Md. 179, 77 Atl. 433;

Guthrie Daily Leader v. Cameron,
3 Okla. 377, 41 Pac. 635;

Board of Commissioners of Red River Bridge District v. Wood, 183 Ark. 1082, 40 S. W. (2nd) 435.

VIII.

THE ACT AS AMENDED VIOLATES SECTION 5, OF ARTICLE X, OF THE MONTANA CONSTITUTION, WHICH PROVIDES THAT COUNTIES SHALL PROVIDE SUCH RELIEF AS IS CONTEMPLATED BY THE ACT, AND SUCH PROVISIONS OF THE CONSTITUTION ARE MANDATORY AND PROHIBITORY.

Section 5, Article X, of the Montana Constitution, provides:

> "The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

Section 29, of Article III, of the Montana Constitution, provides:

> "The provisions of this constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."

The act as amended provides that 95 per cent of the license fees shall be credited by the state treasurer

> "to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund and after the issuance of such proclamation said 95 per cent of said license fees shall be by such state treasurer credited to the General Fund of the state."

By Chapter 56 of the Laws of the Extraordinary Session of 1933-34, there was appropriated out of the Emergency Relief Fund the sum of $750,000.00, or so much thereof as may be necessary.

Section 2 of that act provides that:

> "The funds herein appropriated shall be administered by the Montana Relief Commission under the authority and provisions of Chapter 20 of the Laws of the Extraordinary Session of 1933, and under the same rules and regulations provided by such Commission for the administering of Federal Relief Funds, and for providing the means of employment for the unemployed. • • •"

Chapter 20 of the Laws of the Extraordinary Session, which is mentioned in Chapter 56, provides as follows:

> "Section 1. There is hereby created a state institution to be known as Emergency Relief, the purpose of which shall be to provide means for the sustenance of life and the relief of distress among people of the state whom economic conditions, industrial inactivity, or other cause over which they have no control has deprived of support.
>
> "Section 2. There is hereby created, and the proper and usual officers of the state are hereby directed to set up and establish, a fund to be known as Emergency Relief Fund to which shall be distributed such moneys

as are provided therefor by the Legislative Assembly.

"Section 3. The Montana Relief Commission is hereby authorized and it shall be the duty of that Commission to administer the fund herein created, and to administer the Emergency Relief as a state institution in such manner as to effectuate the purpose of this Act as herein set forth.

"Section 4. The institution herein created and the fund herein directed to be set up shall lapse, and the authority of the Montana Relief Commission with relation thereto, shall cease, at such time as shall hereafter be specified by the Legislative Assembly."

It thus appears that 95 per cent of the tax is imposed for the purpose of providing funds for "the sustenance of life and the relief of distress among the people of the state whom economic conditions, industrial inactivity, or other cause over which they have no control has deprived of support."

The furnishing of such relief is a duty imposed by Section 5, of Article X, of the Constitution, upon the counties of the state, and is not a function to be discharged by the state.

State v. Gowdy,
62 Mont. 119, 203 Pac. 1115;

Jones v. Cooney,
81 Mont. 340, 263 Pac. 429.

See also:

Walker v. Bedford,
93 Colo. 400, 26 Pac. (2nd) 1051.

Appellants endeavor to justify the act on the ground of an emergency, and on the fact that, irrespective of the constitutional provisions, the state has the power to enact such

legislation as this under the police power. Finally, they suggest that the objectionable part "may be amended by striking out invalidating provisions, or supplying others to make it conform to constitutional requirements." The latter is, of course, so clearly the function of the Legislature, and not a function which may be discharged by the court, that it needs no refutation.

The assertion that the police power of the state extends to an act of this kind is well answered in a statement by the Montana Supreme Court in *State v. Gowdy, supra*, where it said:

> "There is nothing whatsoever embraced in either the title of the act or the body thereof to indicate an intention to exercise the police power of the state, and the act itself expressly denominates the assessment as 'a tax' and it must be conceded to have all the characteristics of a tax. It is a charge imposed by the Legislature for purposes of revenue and it is an enforced proportional contribution levied by the state for county purposes."

Little heed need be paid to the contention that the act is justifiable as an emergency measure. The act does not purport to be of such character, but even if it contained any recitals that it was an emergency measure, that would not justify any court in holding an unconstitutional act valid.

In response to a similar contention that was made in *Walker v. Bedford, supra*, the Supreme Court of Colorado said:

> "We pronounce as the most certain of law that there has never been and can never be an emergency confronting the state that will warrant the servants of the constitution waiving so much as a word of its provisions."

We have heretofore considered the question of severability (Page 47), and noted the rule that the presumption is against the severability of a statute of this character. Therefore, the unconstitutionality of this provision renders the entire act invalid.

IX.

THE ACT AS AMENDED DELEGATES LEGISLATIVE POWER TO THE GOVERNOR, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE MONTANA CONSTITUTION, IN THAT HE IS AUTHORIZED TO DETERMINE THE AMOUNT OF THE TAX TO BE CREDITED TO THE EMERGENCY RELIEF FUND AND DECLARE BY PROCLAMATION WHEN SAID MONEY SHALL NO LONGER BE REQUIRED FOR SAID PURPOSE.

We feel that the issues heretofore presented are conclusive upon the invalidity of the acts in question. The act as amended, however, would seem to further violate the Montana Constitution, in that it unlawfully delegates to the Governor the legislative power of making an appropriation as it is ordinarily defined.

4 *Corpus Juris*, pp. 1457, 1458, 1460.

In the *Veto case*, 69 Mont. 325, 222 Pac. 428, the Montana Supreme Court said:

> "The executive, in every republican form of government, has only a qualified and destructive legislative function and never creative legislative power."

CONCLUSION

In conclusion, we point out again that the appellee has paid the usual property taxes in Montana, and also pays the corporation license or occupation taxes on the basis of a

percentage of its intrastate revenues (R. 25), and that the appellee, along with the comparatively few other telephone companies out of many, has been singled out for two large license taxes payable in the year 1934, and that these license taxes are levied upon the privilege of engaging in, or carrying on, the business of constructing, maintaining and operating telephone lines and telephone instruments within the State of Montana, and, specifically, upon the telephone instruments in the acts identified and described, and that such business as conducted by the appellee is both intrastate and interstate in character, and the telephone lines and telephone instruments are used in common for both classes of service; that no discrimination has been made in the acts as between the two classes of service, and, indeed, none could be made, since the tax is laid specifically upon instrumentalities used in common for both services. For the reasons set forth in this brief, we respectfully submit that these acts violate the several provisions of the Constitution of the United States and the Constitution of the State of Montana, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

CHAPTER 174, LAWS OF MONTANA, 1933, TWENTY-THIRD SESSION.

An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to Pay License Taxes and Providing Penalties.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20c) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the

tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

Section 5. This Act shall be in full force and effect from and after its passage and approval.

Approved March 16, 1933.

CHAPTER 54, LAWS OF MONTANA, 1933-34, TWENTY-THIRD EXTRAORDINARY SESSION.

An Act Amending Section 1, and Section 4, of Chapter 174, of the Session Laws of 1933, Requiring Every Person, Firm, Co-partnership, Association, Joint Stock Com-

pany, Syndicate and Corporation Engaged In or Carrying On the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana, to Pay License Taxes and Providing Penalties.

Be It Enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

"A license tax of Two Dollars ($2.00) for each such instrument.

"No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not ap-

ply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the State."

Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said Chapter before its amendment by this Act.

Section 4. This Act shall be in full force and effect from and after its passage and approval.

Approved Jan. 20, 1934.